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RESCISSION STATUS

COMMUNICATION

FROM

THE ACTING COMPTROLLER GENERAL OF THE UNITED STATES

TRANSMITTING

A REPORT ON THE STATUS OF BUDGET AUTHORITY PROPOSED FOR RESCISSION UNDER THE IMPOUNDMENT CONTROL ACT, FOR WHICH CONGRESS FAILED TO PASS A RESCISSION BILL

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COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, DC, December 16, 1985.

B-216664.
Hon. THOMAS P. O'NEILL, Jr.,
Speaker of the House of Representatives.

DEAR MR. SPEAKER: This letter reports the status of budget authority proposed for rescission under the Impoundment Control Act, for which the Congress failed to pass a rescission bill before the 45-day statutory withholding period expired on November 10, 1985. Despite the expiration of their fiscal year availability, the funds at issue, $11.526 million appropriated to the Office of Refugee Resettlement, Department of Health and Human Services, have remained available by order of the court in a lawsuit brought by members of Congress and others to compel obligation of the funds. As a result of a permanent injunction in that suit, the funds have been released as of November 25, and grants are now being made. However, as discussed below, the suit is still pending over the underlying issue of availability of these funds.

Pursuant to section 1015(a) of the Impoundment Control Act, 2 U.S.C. § 686(a), we reported to the Congress on September 26, 1985, the withholding of $11.526 million that should have been, but was not, reported to the Congress by the President. These funds were appropriated to the Office of Refugee Resettlement for refugee and entrant assistance activities. Because it appeared that there were no plans to make the funds available before they were to expire at the end of fiscal year 1985, we reported the withholding as a rescission proposal under section 1012 of the Impoundment Control Act, 2 U.S.C. § 683. Under section 1015(a), our report had the same legal effect as a resicission proposal transmitted by the President under section 1012. (A detailed discussion of the circumstances surrounding the withholding and an analysis of the legal issue involved are contained in our September 26 report to the Congress, a copy of which is enclosed.)

Under section 1012(b) of the Impoundment Control Act, 2 U.S.C. § 683(b), funds proposed for resicission must be made available for obligation unless the Congress completes action on a rescission bill before the expiration of the 45-day period of continuous session of the Congress following the day such proposal is received by the Congress. For the $11.526 million which was the subject of our September 26 report, this 45-day period expired on November 10, 1985, without the Congress having passed a bill rescinding the funds. (In our original report, we said, based on the then-current congressional schedule, that the period would expire on November 15. Based on subsequent schedule changes, the correct date was November 10.)

In the ordinary course of events, the budget authority would have expired for obligation on September 30, 1985, the last day of

its fiscal year availability. However, its availability was extended by order of the United States District Court for the Northern District of California in a lawsuit brought by Members of the Congress and other interested parties to compel the release and obligation of the funds. The district court also granted a permanent injunction ordering that the funds be made available and obligated. *(Edwards et al.* v. *Heckler et al.* No. C8520593 RPA, N.D. Cal.). The Department of Health and Human Services has appealed the case to the United States Court of Appeals for the Ninth Circuit. The budget authority, however, remains available pending the outcome of that litigation.

The funds at issue were apportioned by the Office of Management and Budget on September 30, 1985, with a footnote that the apportionment was made pursuant to the district court's order in *Edwards* v. *Heckler.* According to officials of the Department of Health and Human Services, the Department recorded $11.526 million of miscellaneous obligations against the budget authority, a bookkeeping technique to prevent the funds from expiring. These officials also told us, however, that the Office of Refugee Resettlement, at that time, was awarding no grants to states under the Refugee and Entrant Targeted Assistance Program pending the outcome of the litigation.

On November 18, the district court denied a Department motion to stay its order pending the Department's appeal to the court of appeals; the court of appeals has denied an emergency motion filed by the Department, also requesting a stay of the order pending the appeal. In response to the action by the court of appeals, the Office of Refugee Resettlement began awarding grants to states on November 25. The Office has advised grantees that their grants are subject to the litigation and that they should be prepared to reimburse the Department the amount of the grant if the court accepts the Department's arguments in the case. We understand that oral arguments are scheduled for January 1986.

Sincerely yours,

MILTON J. SOCOLAR,
Acting Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, DC, September 26, 1985.

B-216664.

To the PRESIDENT OF THE SENATE and the SPEAKER OF THE HOUSE OF REPRESENTATIVES:

This letter reports a rescission of budget authority, appropriated to the Office of Refugee Resettlement, Department of Health and Human Services, that should have been, but was not, reported to the Congress by the President pursuant to the Impoundment Control Act of 1974.

Section 1015(a) of the Impoundment Control Act (2 U.S.C. § 686(a)) requires the Comptroller General to report to the Congress whenever he finds that any officer or employee of the United States has ordered, permitted, or aproved the establishment of a reserve of budget authority, and the President has failed to transmit a special message with respect to such reserve. Because it appears

that there are no plans to obligate these funds before they expire, we are reporting the withholding as a rescission proposal.

The rescission in question occurs in the Refugee and Entrant Targeted Assistance Program (the Program), administered by the Office of Refugee Resettlement (ORR). Funding for the Program was the subject of our decision B-219061, June 28, 1985. At that time, ORR had interpreted the Continuing Resolution which funded the Program (Pub. L. No. 98-473, 98 Stat. 1837, 1963, Oct. 12, 1984) as providing for a $50 million funding level in fiscal year (FY) 85. ORR regarded a carryover balance from FY 1984 of $39.026 million as counting toward the $50 million with only $10.974 million in new budget authority available for FY 1985 under the Continuing Resolution. We, on the other hand, concluded that the Congress had intended that the $50 million provided in the Continuing Resolution be in addition to the carryover from fiscal year 1984 resulting in a total of $89.026 million available for obligation in FY 1985.

Until our June 28 opinion, the delay in obligating targeted assistance funds for FY 85 was the result of ORR's belief that $50 million was the correct figure for the 1985 funding level. Moreover, there was at the time of our decision no reason to believe that the full amount of funding for the Program would not thereafter be made available. Accordingly, we did not report an impoundment at that time.

The Office of Management and Budget (OMB) has now apportioned for the Program in FY 85 a total of $77.526 million. While there may be some basis under the language of the Continuing Resolution for that figure, our view remains, in light of the legislative history, that the correct amount is $89.026 million.

Under the language of the Continuing Resolution, the amount intended to be available for the Program for FY 85 is the lesser of either (1) the FY 1984 rate of operations, which was $77.5 million, or (2) the rate authorized by H.R. 3729 as passed by the House of Representatives, which was $50 million. The lower of the two is $50 million, and our June 28 decision held that Congress intended this $50 million to be available in addition to $39 million in carryover from FY 1984, resulting in a total availability of $89 million.

There is an anomaly in this result: in the face of statutory language making available for the Program the lesser of two rates, neither of which apparently exceeds $77.5 million, we concluded that the Continuing Resolution in effect permits the Program to operate at a funding level of $89 million.

There may well be merit in the argument that if the $39 million in carryover is to be added to the $50 million authorization rate, the $50 million rate should be adjusted to take this into account before it is compared to the $77.5 million current rate. With that adjustment, the comparison is between an authorized rate of $89 million in fiscal year 1985, including the carryover, and a "current rate" in FY 84 of $77.5 million. The proper Continuing Resolution rate, the lesser of these two, would then be $77.5 million. This approach at least avoids the anomaly of a funding level, $89 million, that exceeds both of the reference points designated in the Continuing Resolution.

Nevertheless, we remain persuaded by the legislative history that the Congress intended to make $50 million available and intended this to be in addition to the $39 million in carryover funds. As we said in our June 28 decision, the language in the conference report supports this conclusion. The report refers expressly to the $50 million figure as being available for targeted assistance in FY 1985 and suggests that the entire $50 million is intended to be new budget authority for FY 1985.

Accordingly, in fulfillment of our responsibility under the Impoundment Control Act of 1974 we are apprising the Congress of the unreported withholdings of budget authority. Because our opinion remains that $89.026 million in budget authority is available for the Program for FY 85, whereas only $77.5 has been apportioned, we consider that the difference, $11.526 million, is being reserved from obligation without a special message having been transmitted as required by section 1012(a) of the Impoundment Control Act of 1974, 2 U.S.C. § 683(a).

This impoundment report may not ultimately result in release of the funds since they will not be available for obligation after September 30, and this report has the effect, by operation of law, of permitting the withholding to continue for 45 legislative days. For purposes of this report and based on the current congressional schedule, the 45-day period during which the funds may be withheld expires on November 15, 1985.

CHARLES A. BOWSHER,
Comptroller General of the United States.

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